80-991

Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

NO. ____

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1980

BARRY B. GEORGE, PETITIONER

v.

GARY W. KAY

PETITION FOR WRIT OF CERTIORARI
FROM THE U.S. COURT OF APPEALS
FOR FOURTH JUDICIAL CIRCUIT

Hammond A. Beale, Esquire
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Post Office Box 9526
Columbia, South Carolina
29290
(803) 783-4570

QUESTIONS PRESENTED-

1. Whether or not a lower level federal employee, such as a postal inspector, is absolutely immune from suit and liability for the common law tort of defamation committed during a routine investigation.

2. Whether the District Court should have granted Summary Judgment when material issues of fact remain to be determined.

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1980

No. ____

Barry B. George, Petitioner

v

Gary W. Kay

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS

FOR FOURTH JUDICIAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Barry B. George, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on 17th day of September, 1980.

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4. Green v. James, 473F. 2d 660 (9th Cir. 1973) . . . . . .

STATUTES

1. 18 U.S.C.A. Section 3056 . . . A31

2. 39 U.S.C.A. Section 3523 . . . A34

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is printed in Appendix A hereto, infra, page A23. The judgment of the United States District Court for the District of South Carolina, Columbia Division, is printed in Appendix A hereto, infra, page A15, judgment being filed there on October 30, 1979.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 17, 1980. The jurisdiction of the Supreme Court is involved under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Federal Rules of Civil Procedure 12(b)(6) and Rule 56. Appendix, p. A36.

STATEMENT OF CASE

Plaintiff, a practicing attorney in Columbia, South Carolina, brought an action against the Defendant personally in the Court of Common Pleas for Richland County, South Carolina, alleging the common law tort of defamation and seeking money damages (Appendix, p. A1). The Defendant, a postal inspector, timely filed his Petition for removal of the action to the United States District Court for the District of South Carolina. In support of his Motion, he submitted two Affidavits of the Defendant (Appendix, pp. A5, A9) and an Affidavit of his superior

(Appendix, p. A10). Plaintiff countered with an Affidavit of Issac Henry, the one to whom the alleged slanderous statements were published (Appendix, p. A11). The plaintiff filed his own Affidavit also (Appendix, p. A13). The Defendant also filed his Motion for a protective order.

Without the benefit of oral argument, the Honorable Robert F. Chapman issued his order granting to the Defendant absolute privilege and dismissing the Plaintiff's action (Appendix, p. A15). Timely appeal of the order followed, that appeal being denied (Appendix, p. A20).

STATEMENT OF FACTS

The only facts considered by the lower court were the facts contained in the Affidavits submitted by the respective

parties.

The Plaintiff was and still is a practicing attorney in the City of Columbia and in his practice he particularly emphasizes personal injury litigation arising out of automobile accident cases. He has so practiced law for a period of nine (9) years (Appendix, p. A14). One of the Plaintiff's clients was one Issac Henry whom the Plaintiff had represented in a personal injury suit several years prior.

The Defendant is a United States Postal Inspector working out of Columbia, South Carolina. He has held such a position for approximately eight (8) years and his primary assignment is the investigation of mail fraud cases. In his Affidavit of August 31, 1979 (Appendix, p. A5) he stated he was

assigned a case involving apparent insurance fraud by the Plaintiff and other practicing attorneys. As part of his investigation, he admitted interviewing Plaintiff's client Issac Henry on February 8, 1979. In the interview, the Defendant told Mr. Henry he was being interviewed as a potential government witness. Mr. Henry was told by Defendant the subject of the investigation was the Plaintiff who was suspected of mail fraud involving the same essential patterns and schemes as one "Chip Cothran", who had earlier been indicted (Appendix, p. A6).

To the contrary, Plaintiff submitted the Affidavit of his client, Mr. Henry. He stated he was summoned by the Defendant to the Defendant's office on February 8, 1979. In the course of the interview, the Defendant accused

Mr. Henry of being a liar and he "specifically accused Mr. Barry B. George of helping me stage wrecks in order to collect money from insurance companies." (Appendix, p. A12). The Defendant submits that all statements made by him were in the course of his duties and as a part of his official investigation (Appendix, p. A8). The Defendant's superior submitted an Affidavit that states that the allegations contained in the Plaintiff's Complaint "relate to acts by Inspector Gary W. Kay" and as such were within the scope of his official duties (Appendix, p. A10). The Affidavit of the Petitioner (Appendix, p. A13) clearly states that it is not the duty of a postal inspector to "make and publish slanderous statements."

The statement made by the Defendant

is clearly slanderous if the testimony of Mr. Henry is to be believed. It is also out of the "outer perimeter" of duties if the Affidavit of Petitioner George is to be believed. The lower court held that since the Defendant is a government official, the statement made by him to Plaintiff's client was within the "outer perimeter" of his line of duty and thus he was absolutely immune from the common law or state tort liability.

It is the Petitioner's position that, due to the contrary statements in the opposing Affidavits, material issues of fact remain that can only be determined at trial.

Petitioner also contends that a more stringent standard than "outer perimeter" must be established by the Respondent to qualify for immunity from suit.

REASONS FOR GRANTING WRIT

Certiorari Should Be Granted to Resolve Conflicts In Principle Among the Lower Courts.

RULINGS BELOW:

The United States Court of Appeals for the Fourth Circuit ruled (Appendix, p. A26) that absolute immunity extends to lower level federal officials exercising discretionary authority when no violation of constitutional rights is alleged and the federal official is operating within the outer perimeter of his authority.

The Appeals Court also ruled that no material issue of fact existed as a result of the Affidavits and pleadings before it and Summary Judgment was proper.

The Appeals Court in its opinion upholding the District Court ruled that

all federal government officials have absolute immunity from common law tort liability when acting within the "outer perimeter" of their line of duty. The only exception arises, according to the lower court, when Constitutional issues are raised. Petitioner concedes that no Constitutional issue is raised by the pleadings, but contends that the holding of other appeals courts and this Court have held that immunity from liability is qualified even if no Constitutional question is presented.

In support of the above contention, Petitioner would respectfully show that this Court in Doe v. McMillan, 412 U.S. 306 (1973), stated

> "The official immunity doctrine" which has in a large part of judicial making, confers immunity on governmental officials of suitable rank for the reasons that officials of government should be free to exercise their duties unembarrassed by fear of damage

> suits in respect of acts done in the course of those duties.
>
> Official immunity is not the same for all officials for all purposes; judges like executive officers with discretionary functions have been held absolutely immune regardless of their motive or good faith while policemen and like officials enjoy a more limited privilege. (Emphasis added)

There is, in light of the above, a limit to the extension of official immunity. That first test is established in Doe as suitable rank or decision maker.

In the case of Green v. James, 473 F.2d 660 (9th Cir. 1973) the Court stated that:

> ...immunity is afforded only in those instances where the official in question (1) was acting within the outer perimeters of his official duties and (2) was performing discretionary (as opposed to ministerial) acts.

Therefore, after making a determination as to "suitable rank" one has then to

meet two further tests.

It is submitted that despite the Affidavits of Mr. Kay and Mr. Pierce (Appendix, pp. A5, A9, A10) Mr. Kay was not acting within the outer perimeters of his official duties. The duties and responsibilities of postal inspectors are specifically enumerated in 39 U.S.C.A. Section 3523, and while the listing is extensive, a postal inspector is not authorized to publish charges of criminal activity; moreover negative implication would indicate that it was specifically prohibited in that a postal inspector is to report his findings of fact to the United States Attorney (39 U.S.C.A. Section 3523(2)(k).

The third test, that of performing a discretionary act, cannot be met as Mr. Kay does not hold a position in which he can exercise the degree of

discretion contemplated. It is submitted that a postal inspector is a lower level administrative position involving routine investigation of postal activities, analogous to the role of a policeman. Such activities as he may perform are carefully governed by rules and regulations covering his conduct in such an investigation. The degree of discretion a postal inspector is contemplated to exercise is not that of a higher level policy making official or of the adjudicative nature of the judiciary.

It is further contended that the specified duties of the postal inspector include the arrest of postal offenders, a duty which exhibits remarkable similarities to a policeman (39 U.S.C.A. Section 3523(2)(k), and as stated in Doe would be afforded only a more

limited privilege. In Galella v. Onassis, 487 F.2d 986 (2nd Cir. 1973) involving action against certain Secret Service agents, the Court, while granting immunity to these particular agents, said

> Federal agents when charged with duties which require the exercise of discretion are immune.... Ordinarily enforcement agents charged with the duty of arrest are not so immune.

In this connection it should be noted that Secret Service agents are afforded a specific grant of discretion (18 U.S.C.A. Section 3056) while postal inspectors do not enjoy a similar grant of authority.

Defendant's contention, that immunity automatically cloaks Mr. Kay, skirts the Plaintiff's issue, that no immunity can be afforded the Defendant. The pleadings do not substantiate

Defendant's claim to immunity, as he fails to meet the tests of (1) "suitable rank", (2) action within his practiced duties, and (3) performing a discretionary act. The failure to meet these tests must necessitate a denial of immunity. Neither the trial judge nor the Appeals Court ever addressed these questions and therefore erred.

This Court in Butz v. Economou, 438 U.S. 478 (1978) directed lower courts to look not merely to the position held by an official but to look to the "special nature" of (one's) responsibilities (Butz, p. 2913).

The decision of the Appeals Court in the instant case fails to consider if a "special nature" exists contrary to Butz and ignores the three-prong test developed in Doe and Green. The lower court's decision in the instant

case has created a new more limited standard in contradiction to other courts of equal authority and the Petitioner respectfully submits that certiorari should be granted to determine which standard of immunity should exist for federal officials.

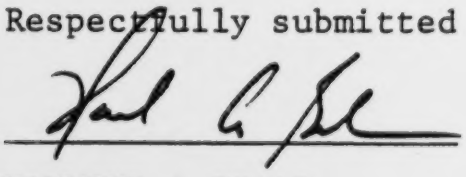
CONCLUSION

It is therefore respectfully submitted that the lower court erred in its granting of the Motion for Summary Judgment. Kay's bare claim that he was a federal official and was engaged in his duties is not a sufficient or complete defense to warrant Summary Judgment.

The Appellant therefore prays that this Court reverse the decision of the Court below.

Likewise the opposing Affidavits of the parties create issues of fact to be determined at trial and the action should therefore be returned to the District Court for a full trial upon the merits.

Respectfully submitted



HAMMOND A BEALE
709 Greenlawn Drive
Post Office Box 9526
Columbia, South Carolina
29290

COMPLAINT
DOCKET NO. _____

The Plaintiff herein would respectfully show unto this Honorable Court:

1. That the Plaintiff is a resident of the County of Richland, State of South Carolina, and that, upon information and belief, the Defendant is a resident of the County of Richland, State of South Carolina.

2. That at all times herein mentioned the Plaintiff was, and for many years past has been, and now is, an attorney by profession; that Plaintiff had by his good conduct, industry and ability, attained prior to February 8, 1979, an excellent reputation in his profession. That upon information and belief, on or about February 8, 1979, the Defendant herein contacted one Isaac Henry, and summoned Mr. Henry to his office.

3. That upon information and belief, at a meeting between Mr. Isaac Henry and the Defendant herein in the Defendant's office on February 8, 1979, in the presence of Mr. Henry and one other unnamed person, the Defendant stated that the Plaintiff herein has been a party to certain unethical, fraudulent, and unlawful behavior, all of which was false and known at the time to be false when the Defendant made the said statements.

4. That upon information and belief, the Defendant has made similar statements and accusations to various other members of the community, and clients of the Plaintiff herein.

5. That said publication was false and defamatory and was made

maliciously and wilfully to injure Plaintiff in his professional Capacity.

6. That by means of the defamatory communication by the Defendant set forth above, Plaintiff has been injured in his good name, reputation and credit as an attorney and will cast a strong stigma on his standing as an attorney, and has greatly injured his relationship with doctors, physicians and other professionals with whom the Plaintiff must work as an attorney and will greatly deter his obtaining clients and practice in the future, all to the Plaintiff's damage in the sum of Two Million and 00/100 ($2,000,000.00) Dollars.

WHEREFORE, Plaintiff prays that this Court award Plaintiff Two Million and 00/100 ($2,000,000.00) Dollars, actual and punitive damages, and for such other and further relief as this Court may deem just and proper.

HAMMOND A. BEALE

BY: /s/ Hammond A. Beale
HAMMOND A. BEALE
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina

August 28, 1979

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF RICHLAND)

PERSONALLY appeared before me Barry B. George, who, being duly sworn, deposes and says: That he has read the foregoing Complaint and that the allegations contained therein are true of his own knowledge, except as to those matters alleged on information and belief, and as to those he believes them to be true.

/s/ Barry B. George
BARRY B. GEORGE

SWORN to and SUBSCRIBED before me this 28th day of Sept., 1979.

/s/ Hammond A. Beale
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 5/22/83

FILED OCT-8, 1979
MILLER C. FOSTER, JR., CLERK

MOTION TO DISMISS
OR IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT

The defendant respectfully moves the Court for an Order dismissing this action, or in the alternative for summary judgment. Said motion is based upon the following grounds:

1. The Court lacks jurisdiction over the subject matter;

2. The complaint fails to state a claim upon which relief can be granted;

3. The plaintiff's alleged claim is one for the common law tort of defamation; consequently the defendant is absolutely immune;

4. The defendant is entitled at least to qualified immunity in view of the reasonable actions and good faith belief that all his actions were proper, as reflected by the affidavits of defendant filed herewith and the record of this case.

5. There is no genuine issue as to any material fact.

Said motion is further based upon the record of this case, the affidavits filed herewith, and the supporting memorandum filed herewith.

Respectfully submitted,
THOMAS E. LYDON, JR.
United States Attorney

By /s/ Wistar D. Stuckey
WISTAR D. STUCKEY
Assistant United States
Attorney
Attorneys for Defendant
Columbia, South Carolina
September 24, 1979

State of South Carolina)
SS
County of Richland)

Personally appeared, Gary W. Kay, United States Postal Inspector, Columbia, SC who first being duly sworn, deposes and says:

I am a United States Postal Inspector domiciled at Columbia, SC. My primary assignment is the investigation of major mail fraud cases. I have been a United States Postal Inspector for approximately 8-1/2 years. I have been domiciled at Columbia, SC for approximately 4 years.

I have had officially assigned to me for investigation a case involving apparent insurance fraud by Barry B. George, et al, involving the possible planning and staging of automobile accidents for the purpose of submitting claims and collecting benefits from various automobile insurance companies. This investigation is based on information gathered by me in my official duties as a United States Postal Inspector.

As part of this investigation, I interviewed one Isaac Henry at my office at Columbia, SC on February 8, 1979. The only people present at this interview were Mr. Henry and myself. The interview began at 6:07 p.m. and concluded at 6:40 p.m. The purpose of the interview of Mr. Henry was to question him concerning an automobile accident that occurred at Columbia, SC on February 6, 1975 involving Mr. Henry and others.

At the beginning of the interview, I identified myself to Mr. Henry by

showing him my credentials. He was told that the purpose of the interview was to determine the truth of events surrounding the alleged wreck at Columbia, SC on February 6, 1975. Mr. Henry was also told that he was being interviewed not as a potential defendant in any case that may arise as the result of our investigation of that accident and other accidents, but rather as a potential government witness. He was told that the subject of the investigation was Barry George. He was asked whether he knows "Chip Cothran", a Columbia, SC Attorney at Law who has been indicted for mail fraud involving the same essential patterns and schemes as Barry B. George is suspected of. Mr. Henry denied knowing Mr. Cothran.

The remainder of the interview consisted only of questions concerning the events surrounding the 2/6/75 accident. The only reference to Barry George during the remainder of the interview was when Mr. Henry stated that he went to Mr. George for legal representation as a result of this accident, and that he knew Mr. George prior to the accident.

Regarding the summons and complaint filed in behalf of Barry B. George, plaintiff, by his attorney, Hammond A. Beale in the Court of Common Pleas, State of South Carolina, County of Richland, Columbia, SC on August 28, 1979, I make the following statements:

1. The first numbered paragraph in the summons and complaint alleged that I am a resident of the County of Richland, State of South Carolina. In fact, I am a resident

of the County of Lexington, State of South Carolina.

2. The second numbered paragraph in the summons and complaint states that on or about February 8, 1979 I contacted one Issac (sic) Henry, and "summoned" Mr. Henry to my office. In fact, Mr. Henry was initially contacted by me by telephone on February 6, 1979 and requested to come to my office for an interview. Subsequently, Mr. Henry was interviewed by me at my office on February 8, 1979.

3. As to the third numbered paragraph in the summons and complaint, I deny the allegations.

4. As to the fourth numbered paragraph in the summons and complaint, I deny the allegations.

5. As to the fifth numbered paragraph in the summons and complaint, I deny the allegations.

6. The sixth numbered paragraph of the summons and complaint makes reference to Mr. George's injured relationship with doctors, physicians and other professionals with whom he must work as an attorney. It can only be suggested that Mr. George is referring to my lawful contact with these individuals concerning certain aspects of the investigation of Mr. George. At no time have I made any representation to any doctor, physician, insurance professionals, or any other individuals that Mr. George is guilty of criminal conduct or unethical, fraudulent, and unlawful behavior. The extent of my representation to these individuals,

if asked, is that the subject of this official investigation is Barry George.

/s/ Gary W. Kay
Gary W. Kay,
Postal Inspector

Subscribed and sworn to before me this thirty-first day of August 1979 at Columbia, SC

/s/ Bill Williams
POSTAL INSPECTOR
COLUMBIA, SC 29020

FILED OCT-8, 1979
MILLER C. FOSTER, JR., CLERK

AFFIDAVIT

Personally appeared, Gary W. Kay, United States Postal Inspector, Columbia, South Carolina, who first being duly sworn, deposes and says:

In supplementing my affidavit of August 31, 1979, I would add that all interviews and contacts with persons or potential witnesses relating to the investigation of Barry George were in the course of my duties and in the course of this official investigation. I made no statements to any client of the plaintiff or to any member of the community or to any other person concerning Barry George except in the course of the investigation and as set forth in my affidavit of August 31, 1979. Also, at all times concerning this investigation, I was acting in good faith and upon reasonable belief that the contacts I made were necessary in order to conduct a proper investigation.

/s/ Gary W. Kay
GARY W. KAY
Postal Inspector

Subscribed and sworn to before me this 24th day of September, 1979 at Columbia, South Carolina

/s/ Jolene M. Waddell
NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: Sept. 5, 1983

STATE OF TENNESSEE)
) SS
COUNTY OF HAMILTON)

I, Robert C. Pierce, having been duly sworn, depose and state:

I am the Postal Inspector in Charge of the Chattanooga Division, embracing the State of South Carolina. I have held the position since January 13, 1979. Postal Inspector Gary W. Kay is assigned to the Chattanooga Division and works under my supervision, performing mail fraud investigations in the State of South Carolina.

I have read the complaint filed by Barry B. George in the Court of Common Pleas of Richland County, and I certify that the allegations therein relate to acts by Inspector Gary W. Kay which were within the scope of his official duties. I believe that representation of Inspector Kay by the U. S. Attorney will be in the interest of the Government.

/s/ Robert C. Pierce
Robert C. Pierce
Postal Inspector in Charge

Subscribed and sworn to before me this 5th day of September, 1979, at Chattanooga, TN.

/s/ Richard L. McCracken
Richard L. McCracken
Assistant Postal Inspector in Charge

FILED OCT 18, 1979
MILLER C. FOSTER, JR., CLERK

AFFIDAVIT

PERSONALLY appeared before me, Issac (NMI) Henry, who being duly sworn, deposes and says:

1) I am thirty-two (32) years of age and presently reside at 2517 1/2 Gordon Street, in the City of Columbia, South Carolina. My home telephone number is 256-9656. I am employed at the Retread Shop at 2053 Two Notch Road in Columbia, South Carolina.

2) On Thursday, February 8, 1979, a Mr. Gary W. Kay, U. S. Postal Inspector, telephoned me at my place of employment (Cate-McLaurin). Later I returned his phone call and he stated that he wanted to talk to me about an automobile accident I had been involved in. He told me I had nothing to worry about; that he just wanted to talk to me. He asked me to come to his office and I did so, arriving there at about 6:00 o'clock P.M. on February 8, 1979. When I first arrived, there was no one present except Mr. Kay and me. Later, during the interview, another man came in and sat through the balance of the interview. This other man was a little taller than me, had red hair and was heavy set.

3) When the interview began, Mr. Kay said he wanted to talk to me about a wreck that occurred several years ago. He mentioned the name of the tortfeasor and I remembered the incident. I then began to describe the way the accident happened and he stopped me and said, "Hey, now, stop telling damn

lies". I told him I believe in God and has no reason to lie about anything. He said he had records and other proof that this wreck and other were staged. I asked him to explain what he meant by "staged", but he would never explain to me what he meant.

4) He specifically asked me about my attorney Barry B. George and doctors I had gone to as a result of injuries incurred in automobile accidents. He specifically accused Mr. Barry B. George of helping me stage wrecks in order to collect money from insurance companies. He continuously called me a liar when I would answer his questions about the wrecks. When I refused to change my answers to the questions, he threatened to subpoena me before the grand jury. I told him to go ahead.

5) During the questioning Mr. Kay said "we aren't out to get you or convict you or nothing like that. We are out to get that lawyer", (meaning Mr. George).

6) I make this statement under oath freely and voluntarily without threat or reward or promise of reward and I have received a copy of this statement this date.

/s/ Issac Henry
Issac (NMI) Henry

Columbia, South Carolina
October 16th, 1979.
SWORN to before me this
16th day of October, 1979.

/s/ Hammond A. Beale
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 5/22/83

FILED OCT 18, 1979
MILLER C. FOSTER, JR., CLERK

AFFIDAVIT

PERSONALLY appeared before me Barry B. George, who, being duly sworn, deposes and says:

1) That he is the Plaintiff in this action entitled George vs Kay and is a practicing attorney in Richland County, South Carolina.

2) That he is informed and believes that the Defendant Gary W. Kay is employed by the U.S. Postal Service and as such is vested with the apparent authority to conduct investigations. That he is further informed and believes that the said Defendant did undertake an investigation, the subject of which was the Plaintiff, among other attorneys.

3) That he is informed and believes that it is the function of the said Defendant to conduct a fair and impartial investigation which includes questioning witnesses that may have relevant information. That it is not the duty of the Defendant to make and publish slanderous statements about the Plaintiff (in connection with Plaintiff's practice of law) to third parties and Plaintiff does not believe that such conduct lies within the out perimeter of Defendant's line of duty.

4) That he is further informed and believes that if this Court grants Defendant absolute immunity, that Plaintiff will effectively be left without a remedy. A public officer, such as the Defendant, will be entitled to an unreviewable discretion to commit wrongs. Plaintiff is informed that by

granting the Defendant limited or qualified immunity, his conduct can then be judged by a standard of reasonableness and good faith and a miscarriage of justice can thus be avoided.

5) That he is further informed and believes that he has been injured in his practice of law by the slanderous statements made by the Defendant to one Issac Henry and is entitled to have a jury pass on the issue of damages.

6) That he has practiced law in the County of Richland, State of South Carolina for nine years, with primary emphasis on handling automobile accident cases and the Defendant's statements to Mr. Henry have seriously reflected upon Plaintiff's moral and ethical standing in the legal community.

/s/ Barry B. George
Barry B. George

SWORN to before me this
16th day of October, 1979.

/s/ Hammond A. Beale
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 5/22/83

FILED OCT 30, 1979
MILLER C. FOSTER, JR., CLERK
U. S. DISTRICT COURT

Civil Action No. 79-1901
ORDER

Plaintiff commenced an action against the defendant for the common law tort of defamation of character in State Court on August 18, 1979, but following service of process defendant caused this action to be removed to U. S. District Court pursuant to 28 U.S.C. §1442. Plaintiff is an attorney whose business consists largely of handling automobile accident cases. Defendant is a Postal Inspector with the U. S. Postal Service. This suit arises out of defendant's investigation of plaintiff for possible mail fraud for filing fraudulent claims against insurance companies. Plaintiff alleges that during the course of this investigation, defendant made defamatory remarks about plaintiff's character, accusing plaintiff of staging automobile accidents in order to collect money on insurance policies. In support of these allegations, plaintiff has submitted the affidavit of one Issac Henry who asserts that Mr. Kay, during an interview on February 8, 1979, accused him and Mr. George of staging automobile accidents.

Defendant has moved for an Order dismissing this action, or in the alternative for summary judgment. The motion to dismiss has been made pursuant to Rule 12(b)(1) [lack of jurisdiction over the subject matter] and 12(b)(6) [failure to state a claim upon

which relief can be granted.] The motion made pursuant to 12(b)(6) should be granted and the complaint dismissed for failure to state a claim upon which relief can be granted. Such a motion is appropriate when the affirmative defense of the defendant is that he is immune from suit. Camero v. Kostos, 253 F.Supp. 331 (D.C.N.J. 1966); Wright and Miller, Federal Practice and Procedure: Civil §1357. In this instance, Mr. Kay and his supervising officer, Mr. Pierce, have attached affidavits to the motion which show: (1) Mr. Kay is an inspector with the United States Postal Service; (2) He was officially assigned to investigate a case involving alleged insurance fraud by plaintiff, Barry B. George; (3) His interview with Isaac Henry, in which plaintiff alleges he made the defamatory remarks that are the subject of this action, was conducted pursuant to his assignment to investigate plaintiff; (4) The allegation of the complaint relate to acts by Mr. Kay that were made within the scope of his official duties as Postal Inspector. Affidavits which address the plea in bar, that is of immunity, have been held not to "go outside of the pleadings" and therefore, would not convert this motion to dismiss into one for summary judgment. Camero v. Kostos, supra.

As to the issue of immunity of Mr. Kay, it is generally accepted that a government official is absolutely immune from state or common law tort liability when the acts complained of are within the "outer perimeter" of his line of duty. Anton J. Miller v. Helen DeLaune, ____ F.2d ____, No. 76-2660

(9th Cir. 1979); CFTC v. Hunt, 591 F.2d 1211 (7th Cir. 1979). An act is performed within the scope of official authority when it is related to matters which are committed by law to the control or supervision of the official. Cooper v. O'Connor, 99 F.2d 135 (1938). The allegations of the plaintiff's complaint and the affidavits attached to defendant's motion to dismiss show that all acts of the defendant which are the subject of this action were performed by Mr. Kay in his official capacity as U. S. Postal Inspector. Therefore, he is immune from tort liability in this action.

Wright and Miller have noted that a Rule 12(b)(6) motion is particularly appropriate when the cause of action is one for defamation:

> There is one significant exception to the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion. When the claim alleged is a traditionally disfavored "cause of action," such as malicious prosecution, libel, and slander, the courts tend to construe the complaint by a somewhat stricter standard and are more inclined to grant a Rule 12(b)(6) motion to dismiss.

The defendant has moved for a protective order in connection with affidavits submitted by the defendant in support of its motion to dismiss. Good cause has been shown for the issuance of a protective order and for keeping confidential the information

contained in the various affidavits submitted by the defendant.

IT IS, THEREFORE, ORDERED that neither the plaintiff Barry B. George nor the defendant Gary W. Kay nor attorneys for either of the parties shall disclose to anyone not connected with the case the information contained in the affidavit submitted by the defendant in support of his motion and no copies of the affidavit shall be made, published or delivered to anyone not a party to this suit or an attorney for a party to this action until further Order of this Court.

IT IS FURTHER ORDERED that the motion to dismiss be, and is hereby, granted and the Clerk shall enter an Order dismissing the complaint.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

October 30, 1979
Columbia, South Carolina

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION FILE NO.
79-1901-9

Barry B. George,	)	
	)	
vs.	)	JUDGMENT
	)	
Gary W. Kay,	)	

This action came on for hearing before the Court, Honorable Robert F. Chapman, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged the defendant's motion to dismiss is granted and the action dismissed.

Dated at Columbia, South Carolina, this 30th day of October, 1979.

MILLER C. FOSTER, JR.
Clerk of Court

By
Deputy Clerk

Entered 10/30/79

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

September 17, 1980

TO: Hammond A. Beale, Esq.
Wistar D. Stuckey, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-1781 this date. The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time — A petition may be filed within 14 days after judgment. No extensions will be granted save for the most compelling reasons. Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose — A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict of another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel — A petition shall contain an introductory statement that, in counsel's judgment, one or more of the situations exists which is described in the "Purpose Section" discussed above. Thereafter, the points to be raised, succintly stated, shall then be listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form — The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of motion need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosure

4CCA 28
Rev. 9/17/79

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1781

Barry B. George,

Appellant,

v.

George W. Kay,

Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued: June 2, 1980
Decided: September 17, 1980

Before HAYNSWORTH, Chief Judge, PHILLIPS*, Senior Circuit Judge, and ERVIN, Circuit Judge.

Hammond A. Beale, for Appellant; Wistar D. Stuckey, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney on brief), for Appellee.

*Honorable Harry Phillips, United States Senior Circuit Judge for the Sixth Circuit, sitting by designation.

ERVIN, Circuit Judge:

Barry George, an attorney specializing in automobile personal injury cases, brought a defamation suit in state court against Gary Kay, a United States postal inspector. The suit arose out of a mail fraud investigation by Kay involving possible fraudulent insurance claims filed by George, during the course of which Kay allegedly said to a third party that George had staged accidents in order to recover on insurance policies. The case was removed to federal court under 28 U.S.C. 1442 where Kay moved for dismissal, or, in the alternative, for summary judgment, and filed supporting affidavits. The district court dismissed pursuant to F.R.C.P. 12(b)(6) on grounds that Kay as a government official has absolute immunity from suit for acts that are within the "outer perimeter" of his line of duty.

George argues on appeal that the district court erred in granting a lower level federal official any immunity from a state tort suit; that, if any immunity is available it should be the qualified immunity allowed in Butz v. Economou, 438 U.S. 478 (1978), rather than the absolute immunity allowed in Barr v. Matteo, 360 U.S. 564 (1959); and that the district court erred in granting a 12(b)(6) dismissal.

We affirm the district court with respect to the immunity issue, and, although we find that the district court should have converted the 12(b)(6) motion into one for summary judgment, we do not remand on that issue because we find no prejudice in his handling of

the matter.

I.

In Barr v. Matteo, 360 U.S. 564 (1959), the acting director of the Office of Rent Stabilization, charged with libel, was allowed an absolute privilege defense even though the acts complained of were found to be only within the outer perimeter of his duties and despite allegations that he acted with malice. The Court relied in part on Spalding v. Vilas, 161 U.S. 483 (1896), in which the Postmaster General as head of an executive department was afforded absolute immunity from a libelous distribution suit, but it refused to restrict the immunity to executive officers of Cabinet rank, pointing out that the privilege is not a "badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government". 360 U.S. at 572-73.

We read Barr to extend this absolute immunity to lower as well as upper level federal officials exercising discretionary authority. The Barr Court was careful to point out that the scope of immunity may be greater on occasion for higher level officials than for lower level ones; that is not because of the title of the office, however,

> [b]ut that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. ...[It is] the relation

> of the act complained of to "matters committed by law to his control or supervision," ... which must provide the guide in delineating the scope of the rule .... 360 U.S. at 573-74 (citation omitted).

The grant of absolute immunity to any federal official is not tantamount to granting absolute license to act as he chooses: the immunity is only absolute insofar as the acts complained of are within the scope of the official's authority.

In this case, the affidavits of Kay and his supervising officer reflect that the allegations in George's complaint relate to acts by Kay that were performed within the scope of his official duties as a postal inspector. The district court did not err, therefore, in holding that George was entitled to an immunity defense as a matter of law.

II.

George contends, however, that even if Kay is entitled to any privilege at all, it should be only the qualified immunity granted in Butz v. Economou, 438 U.S. 478 (1978). We disagree.

In Butz, the Court narrowed the scope of privilege allowed in Spalding and Barr, holding that although government officials charged with tortious acts under state law are still allowed an absolute immunity privilege if the acts complained of were within the outer perimeter of their authority, those charged with unconstitutional

acts are entitled only to a qualified immunity. The Court was

> confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.
> 438 U.S. at 495 (footnote omitted).

The Ninth Circuit has recently recognized the distinction Butz made between state tort law claims and constitutional claims. In Miller v. DeLaune, 602 F.2d 198 (9th Cir. 1979), an official of the Internal Revenue Service was accused of both unconstitutional and tortious actions. The district court dismissed the complaint for failure to state a claim, relying on Barr to find that the official was absolutely immune from the suit because her actions were within the outer perimeter of her line of duty. The court of appeals reversed dismissal of the constitutional claim, finding that Butz allowed only a qualified immunity insofar as the official's actions may have violated appellant's constitutional rights. The court affirmed dismissal of the state tort law claims, however,

finding that Butz "explicitly limited its immunity holding to those situations involving constitutional violations ... [and] current law compels the conclusion that a government official ... acting within the outer perimeter of his or her line of duty, is absolutely immune from state or common-law tort liability." 602 F.2d at 199-200 (citations and footnotes omitted).

We find that, as no constitutional violation has been alleged in the instant case,[1] the district court was correct in allowing Kay the Barr absolute privilege rather than the Butz qualified privilege.

III.

We do find, however, that the district court should have granted the motion for summary judgment rather than the 12(b)(6) motion, which is proper only when the complaint on its face fails to state a claim for relief. If it is necessary for the court to look beyond the pleadings, the 12(b)(6) motion must be converted into a motion for summary judgment and all parties must be given the opportunity to present materials pertinent to such a

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[1]Indeed, George admits at page 11 of his brief that no constitutional claim is alleged.

motion.[2] The complaint in this case did not allege that Kay was employed as a federal official; on its face it was a simple defamation complaint. The district court had to look to Kay's motion to dismiss and its supporting affidavits to find that Kay was acting in his capacity as a federal official and that he was therefore entitled to an immunity defense. The record shows, however, that the district court in its ruling on the 12(b)(6) motion also considered affidavits of George and of Isaac Henry, to whom the defamatory statement was allegedly made. The 12(b)(6) motion was therefore effectively, if not formally, treated as a motion for summary judgment.

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[2]The last line of F.R.C.P. 12(b)(6) says

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Because we are as able as the district court to determine that summary judgment would have been properly granted in this case (both parties had ample opportunity to present affidavits; the affidavits presented no issue of material fact; and the scope and status of Kay's employment were clearly established therein), we refuse to remand for the consideration of that motion. See SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) ("It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."); see also Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). We, therefore, affirm the district court's judgment.

AFFIRMED.

18 U.S.C.A. Section 3056
18 U.S.C.S. Section 3056
Secret Service Powers

(a) Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the Office of President, and the Vice President-elect, and the members of their immediate families unless the members decline such protection; protect the person of a former President and his wife during his lifetime, the person of a widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; detect and arrest any person violating any of the provisions of sections 508, 509, and 871 of this title (18 USCS Section 508, 509, 871) and, insofar as

the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and Federal land bank associations are concerned, of sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title (18 USCS Sections 213, 216, 433, 493m 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, 1909); execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services or information looking toward the apprehension of criminals; pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on his certificate; and perform such other functions and duties as are authorized by law. In the performance of their duties under this section, the Director, Deputy Director, Assistant Directors, Assistants to the Director, inspectors, and agents of the Secret Service are authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit.

(b) Whoever knowingly and willfully obstructs, resists, or interferes with an agent of the United States Secret Service or other Federal law enforcement agent engaged in the performance of the protective functions authorized by this section, by the Act of June 6, 1968 (82 Stat. 170) (18 USCS Section 3056 note) or by section 1752 of title 18, United States Code, (18 USCS Section 1752) shall be fined not more than $300 or imprisoned not more than one year or both.

39 U.S.C.A. Section 3523
18 U.S.C.S. Section 3061

Powers of Postal Personnel

(a) Subject to subsection (b) of this section, officers and employees of the Postal Service performing duties related to the inspection of postal matters may, to the extent authorized by the Board of Governors--

(1) serve warrants and subpenas issued under the authority of the United States;

(2) make arrests without warrant for offenses against the United States committed in their presence; and

(3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

(b) The powers granted by subsection (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

F.R.C.P. 12(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objective is waived by being joined with one or more other defenses or objectives in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 56. SUMMARY JUDGMENT

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 15th day of December, 1980, filed the required copies of the Appellant's Petition for Certiorari in the Clerk's Office of the Supreme Court and have mailed the required copies of the same to:

Wistar D. Stuckey, Esquire
Assistant United States Attorney
Post Office Box 2266
Columbia, South Carolina 29202
(803) 765-4583

BY: Barbara E. Grove

December 15th, 1980.

Sworn to before me this 15th day of December, 1980.

Cynthia A Yary
NOTARY PUBLIC FOR VIRGINIA

My Commission Expires: 8/10/84